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No. 81-2057

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALAN J. KARCHER, SPEAKER,
NEW JERSEY ASSEMBLY, *et al.*,
Appellants,

v.

GEORGE T. DAGGETT, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of New Jersey

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BRIEF FOR APPELLANTS

LEON J. SOKOL
MICHAEL D. SOLOMON
GREENSTONE AND SOKOL
39 Hudson Street
Hackensack, New Jersey 07601
Attorneys for Appellant
Carmen A. Orechio, President,
New Jersey Senate

LAWRENCE T. MARINARI
ROBERT A. FARKAS
MARINARI & FARKAS, P.C.
1901 N. Olden Avenue Ext.
Trenton, N.J. 08618
Attorneys for Appellant
Alan J. Karcher, Speaker,
New Jersey Assembly

KENNETH J. GUIDO, JR.*
HARRY R. SACHSE
KEVIN A. GRIFFIN
LOFTUS E. BECKER, JR.
DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE
& GUIDO
1050 31th Street, N.W.
Washington, D.C. 20007
(202) 342-9131

CLIVE S. CUMMIS
CHARLES J. WALSH
JERALD D. BARANOFF
SILLS, BECK, CUMMIS,
ZUCKERMAN, RADIN &
TISCHMAN, P.A.
33 Washington Street
Newark, New Jersey 07102
Attorneys for Appellants
James F. Florio, *et al.*

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether the legislatively enacted congressional reapportionment plan with districts which deviate from population equality by less than the statistical imprecision of the census is constitutional.

2. Whether the legislative policy of preserving minority voting strength justifies small deviations from census population equality in a congressional reapportionment plan.

PARTIES BELOW

Appellant Alan J. Karcher is the Speaker of the New Jersey Assembly. Appellant Carmen A. Orechio is the President of the New Jersey Senate. Appellants James J. Florio, William J. Hughes, James J. Howard, Robert A. Roe, Peter W. Rodino, Jr., Joseph G. Minish, Frank J. Guarini, and Bernard J. Dwyer are Democratic Members of Congress from New Jersey. Appellants were permitted to intervene as parties defendant in the proceedings in the District Court.

Appellees Edwin B. Forsythe, Matthew J. Rinaldo, Millicent H. Fenwick, Harold C. Hollenbeck, James A. Courter, Margaret S. Roukema, and Christopher H. Smith are Republican Members of Congress from New Jersey, and George T. Daggett, Thomas Dunn, Livio Mancino, Rev. Millard D. Birt, Rafael Fajardo, Margaret Dougherty, Maretta N. Jackson, and C. Joseph Lillo were plaintiffs in the proceedings in the District Court.

Appellees Thomas H. Kean, Governor of the State of New Jersey, Irwin Kimmelman, Attorney General of the State of New Jersey, and Jane Burgio, Secretary of the State of New Jersey, were defendants in the District Court.

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Appellees.

On Appeal from the United States District Court for the District of New Jersey

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BRIEF FOR APPELLANTS

OPINION BELOW

The opinion of the three-judge district court is reported as *Daggett v. Kimmelman*, 535 F.Supp. 978 (D. N.J. 1982). The opinion is reprinted as Appendix A to the Jurisdictional Statement, J.S. 1a-29a. The Order of March 11, 1982, making a technical correction, is reprinted in the Joint Appendix, App. 186.

JURISDICTION

The judgment of the three-judge District Court was entered on March 8, 1982, and appellants (intervening defendants in the court below) filed a notice of appeal the same day. J.S. 30a, 34a. The case was docketed on May 6, 1982, fifty-nine days after the notice of appeal was filed. This Court noted probable jurisdiction on June 21, 1982.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253, and the appeal is timely under 28 U.S.C. § 2101(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Article I, Section 2 of the United States Constitution provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

The New Jersey reapportionment statute, New Jersey P.L. 1982, c.1, is lengthy. It is set forth as an appendix to the District Court's opinion. J.S. 15a-20a.

STATEMENT OF THE CASE

This case presents for review the judgment of a divided three-judge court, which invalidated a legislatively enacted congressional redistricting plan with maximum deviations less than the statistical imprecision of the census data from which the deviations are computed. The redistricting plan—P.L. 1982, c.1—was enacted by the New Jersey Legislature, and signed into law by the Governor on January 19, 1982. As required by the 1980 census figures, it reduced the number of congressional districts in the State from 15 to 14. Using the 1980 census figures as corrected to October 30, 1981,[1] the fourteen congressional

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[1] To date, there are three slightly different census figures available for the State of New Jersey. Preliminary figures released early in 1981 showed a total population of 7,364,158. P. Ex. 1, App. 10 (Table 1). These figures were revised by the Bureau of the Census on October 30, 1981. The new figures increased the population of East Orange (and of the State) by 665 people, and made small adjustments not affecting the state's total population in two towns. P. Ex. 1, App. 5-6. Since the trial we have been informed that the Census Bureau has made an additional correction to the New Jersey figures, which will be published and certified to the Governor soon. This correction, we understand, increases the population of East Orange (and of the State) by an additional 188 people, bringing the total population to 7,365,011. It affects the different plans in different degrees. For example, it infinitesimally reduces the maximum deviation of P.L. 1982, c.1, from 0.698400% to 0.698383%.

The October 30, 1981 figures were used in the District Court and are the basis of the extensive computations by the New

districts created by the Legislature have an average deviation of 0.138%, and a maximum deviation between the largest and the smallest districts of 0.6984%, both less than the statistical imprecision of the census data.[2] J. Ex. 7, App. 152; D. Ex. 5, App. 103-104.

Preliminary certified 1980 census figures were available in New Jersey early in 1981. P. Ex. 1, App. 4. State Assembly and Senate districts were thereafter reapportioned first. J. Ex. 3 at 28-32 [hereafter "Karcher Deposition"]. In April or May of 1981, the leadership turned to the question of congressional redistricting, and instructed legislative staff to begin developing plans for the Legislature's consideration. *Id.*, at 42-46.[3]

The primary factor, for legislative leaders and in directions to the staff, was population equality among districts. *See, e.g., id.* at 23-25, 42-43; J. Ex. 1 at 13 [hereafter "Feldman Deposition"]; J. Ex. 2, at 13 [hereafter "Jackman Deposition"]; D. Ex. 1, App. 81-83. The leadership determined that no plan with a deviation over 1% would even be considered. Karcher Deposition at 56. Moreover, dilution of the minority vote was to be avoided throughout the State, and particularly in Newark, which

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Jersey Office of Legislative Services which appear in Joint Exhibits 4-7, App. 119-173. Since the differences are, in our view, trivial, and since conversion to the most current figures would require extensive recalculation, we will continue to use the October 30, 1981 figures in this brief except where specifically noted otherwise.

[2] The "average deviation" is the sum of the deviations from ideal size of all districts, divided by the number of districts, and expressed as a percentage of the size of the ideal district. The figure given in text was computed from figures in J. Ex. 7, App. 152. The "maximum deviation" is the difference in size between the largest and smallest districts, expressed as a percentage of the size of the ideal district.

[3] The Legislature was primarily occupied with state budgeting from April to the end of June, and thereafter was in recess until after the November elections.

contains the State's highest proportion of minority voters. D. Ex. 1, App. 81-84; D. Ex. 2, App. 86-90; Feldman Deposition at 40-43, 79-80; Jackman Deposition at 12-14, 131-134. Two other factors, political fairness, Feldman Deposition at 24-25, 91-94, and preserving New Jersey municipal boundary lines,[4] Jackman Deposition at 91-92, were adopted in drawing the districts embodied in P.L. 1982, c.1.

The full Legislature grappled with redistricting when it reconvened in November, 1981.[5] In December of that

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[4] In fact all of the plans before the District Court and the Legislature preserved municipal boundary lines.

[5] In August of 1981, Dr. Ernest Reock, a faculty member at Rutgers University, had sent copies of his proposed redistricting plan to all members of the Legislature and to various other political officials and legislative staff in the state. P. Ex. 1, App. 4-5. Dr. Reock received oral acknowledgements of receipt from several legislators, and a lengthy letter on the stationery of then Speaker of the Assembly Jackman. *Id.* at 5, 35-41; *see* Jackman Deposition 39, 135-137. He received no other communications, written or oral, from legislators of either party. P. Ex. 1, App. 5.

The District Court's opinion may create some misunderstanding regarding Dr. Reock's plan. The plan Dr. Reock mailed to members of the Legislature and others in August, 1981, was based on the preliminary New Jersey census figures and, using those figures for computation, had a maximum deviation of 0.325%. P. Ex. 1, App. 5. However, those figures were inaccurate. The Census Bureau revised its figures on October 30, 1981. P. Ex. 1, App. 5-6. Using the revised figures, Dr. Reock's plan had a maximum deviation of 0.451%. *Id.* at 6.

After the present lawsuits were filed, Dr. Reock revised his plan on February 16, 1982. *Id.* This revised plan, which does not appear to have been sent to any members of the Legislature and which, of course, was not in existence when P.L. 1982, c.1, was enacted, has a maximum census population deviation of 0.296%. *Id.*

The District Court's reference, Opinion, 535 F. Supp. at 981, 982, J.S. 5a, 8a, to Dr. Reock's plan "as amended" is thus a reference to a version of that plan not in existence until after plaintiffs filed this lawsuit. The District Court's reference, Opinion, 535 F. Supp.

year, both houses passed a bill that was vetoed by Governor Byrne. The Legislature then enacted another bill, which was signed into law on January 12, 1982. N.J. Laws 1981, c. 561. There was considerable dissatisfaction with the law, particularly because of its treatment of Bergen County. *See, e.g.*, Feldman Deposition at 68-73. The new Legislature took office on January 12 and responded to this concern by enacting P.L. 1982, c.1, which was signed by the Governor on January 19, 1982.

On February 2 and 9, 1982, plaintiff-appellees brought these actions against the State appellees to declare P.L. 1982, c.1, unconstitutional and to enjoin its use. The cases were consolidated, appellants were permitted to intervene as defendants, and the case was submitted on depositions, affidavits and exhibits without a trial. On March 3, 1982, the three-judge District Court by a divided vote declared P.L. 1982, c.1 unconstitutional.[6] Judgment was entered on March 8, 1982. J.S. 30a.

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at 982, J.S. 8a, to Dr. Reock's original plan as containing a "total deviation of .3250%" is misleading because it uses the inaccurate, original census figures for New Jersey as a basis for computation. See note 1, *supra*. Using the October 30, 1981 census figures—the figures used in computation for all other plans—the correct figure should be .451%. P. Ex. 1, App. 6.

[6] The District Court's opinion contains several typographical errors with regard to the figures concerning P.L. 1982, c.1. As originally issued, and as reprinted in the Jurisdictional Statement, the opinion contains the following passage:

> The Fourth District contains the greatest variance in excess of the "ideal" district: 1,413 people or .2666%. The Sixth District contains the greatest variance below the ideal district: 1,290 people, or .2452%.

J.S. 9a. On March 11, the District Court entered an order amending the Sixth District figures to "2,261 people, or .4298%." App. 186. Although not amended by the District Court, it appears from the record that the deviation figure for the Fourth District should be .2686%. J. Ex. 4, App. 124.

The District Court read *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *White v. Weiser*, 412 U.S. 783 (1973), as invalidating any legislatively drafted congressional redistricting plan if it is possible that a plan with smaller census population deviations could be developed. Opinion, 535 F. Supp. at 981-982, J.S. 7a-8a. The court found that several other plans (some introduced in the Legislature before P.L. 1982, c.1, became law and others introduced later or not at all) existed with lower census population deviations. Opinion, 535 F. Supp. at 982, J.S. 8a. The court gave no consideration to defects in the other plans. It also concluded that even if preventing dilution of minority voting strength was a legitimate consideration justifying deviation from absolute census population equality, that justification was absent in this case because the district with the largest black population (District 10, containing Newark) was not one of those with the highest deviation, and because the city of Orange was not included within the district. *Id.* at 982-983, J.S. 9a-10a. Finally, the District Court rejected appellants' argument that *Kirkpatrick* and *White* are satisfied when the Legislature's plan shows deviations from absolute census population equality that are less than the statistical imprecision of the census. *Id.* at 983, J.S. 10a. The District Court enjoined the state officials from holding any election under P.L. 1982, c.1, gave the Legislature until March 22, 1982 to enact a new redistricting statute, and stated that if the Legislature did not "this Court will convene on March 26, 1982 to undertake further proceedings." *Id.*[7]

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[7] The District Court's opinion does not speak directly to the state-law question whether, if the redistricting plan of P.L. 1982, c.1 is declared unconstitutional, effect should still be given to Section 3 of the act, which repealed the prior redistricting act, P.L. 1981, c. 561.

Circuit Judge Gibbons dissented. He would have held that where the deviation between districts is less than the recognized statistical imprecision of the census, a good faith effort to achieve true population equality has been shown as a matter of law:

> [T]he only relevant constitutional consideration, in the absence of a much needed federal statute imposing standards for congressional districting, is the achievement of equal representation for more or less equal numbers of persons. A deviation in population between the largest and the smallest district of 0.6984% is smaller than the recognized margin of undercounting in the census. I would hold that achievement of that small a deviation demonstrates as a matter of law a good faith effort to achieve equal member districts.

Opinion, 535 F. Supp. at 985, J.S. 14a (dissent).

The District Court denied appellants' motion for a stay pending appeal. J.S. App. 33a. On March 15, 1982, Justice Brennan stayed the District Court's judgment. J.S. 36a-41a. On March 29, this Court denied motions to vacate the stay or, in the alternative, to expedite the proceedings. J.S. 42a. On April 13, Justice Brennan denied a motion to modify the stay. J.S. 43a. This Court noted probable jurisdiction of the appeal on June 21, 1982.

SUMMARY OF ARGUMENT

The District Court should not have invalidated the congressional redistricting plan duly enacted by the New Jersey State Legislature, P.L. 1982, c.1. This Court has repeatedly emphasized—and only last Term reiterated—that the primary role in redistricting must be left to the legislatures, which alone are entrusted with a mandate to reconcile the various and often competing affected interests. If legislatures are to fulfill that role, they must be

allowed some latitude to choose among several possible redistricting plans. In making a choice within that latitude, a legislature need not adopt any particular plan merely because it achieves the smallest apparent deviation, irrespective of other concerns important to the citizens of the State. This is particularly true where, as in this case, the differences among competing plans are within the statistical imprecision of the census.

As with any measuring instrument, the census contains an unavoidable statistical imprecision. Within that margin, there is no way to discern whether minute changes in the apparent size of district populations would or would not actually advance the goal of population equality of congressional districts. Deviations less than the statistical imprecision of the census data are the functional equivalent of zero. Where the overall deviation of a legislatively enacted redistricting plan is less than the statistical imprecision of the census data, the legislature has created districts "as mathematically equal as reasonably possible," *White v. Weiser*, 412 U.S. 783, 790 (1973), and the legislative plan should be upheld.

Instead, the divided District Court applied a standard which ignored the limitations in the census enumeration process, and if applied nationwide would place in jeopardy the majority of plans adopted by state legislatures using the 1980 census data. Employment of the District Court's standard would reduce the sensitive political judgments involved in redistricting to a contest among computer programmers. The constitutional requirements of Article I, § 2, ought not to be reduced to such an illusory quest for mathematical precision.

Even if legislatures were required to reach closer to apparent equality of districts based upon available census population figures than the statistical imprecision of the

census, P.L. 1982, c.1, should still be upheld. All the alternative plans, whether available to the New Jersey Legislature at the time it acted or developed thereafter, contained serious flaws, which ought to disqualify them even if the census population deviations of the alternative plans were minutely smaller. Some plans omitted portions of the State; others included the same municipality in more than one district. Even competing plans without technical defects were flawed because each of them would have diluted minority voting strength in one or more of the areas of New Jersey in which minority votes are a potentially significant factor.

As the uncontroverted evidence in this case reveals, the New Jersey Legislature sought to achieve population equality in adopting P.L. 1982, c.1. It chose that bill over plans favored by appellees because it best reflected the interests of the black leadership in New Jersey who sought to preserve minority voting strength. Moreover, the minute deviations in P.L. 1982, c.1, are well within the statistical imprecision of the census data. Consequently, the New Jersey Legislature made a "good faith effort to achieve precise mathematical equality," *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531 (1969), within the limits of the accuracy of the census data, as required by this Court's previous decisions. Its efforts should be upheld and the redistricting plan sustained.

ARGUMENT

I. LEGISLATIVE POLICY IS A FACTOR OF PRIMARY IMPORTANCE IN CONGRESSIONAL REDISTRICTING, FOR WHICH THE DISTRICT COURT'S STANDARD LEAVES NO ROOM.

A. This Court's prior cases establish that legislative policy is a primary factor in redistricting cases.

This Court has always recognized that "reapportionment is primarily a matter for legislative consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).[8] Reapportionment is not merely an exercise in long division. Rather, "dealing as it must with fundamental 'choices about the nature of representation,' [it] is primarily a political and legislative process." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (state legislative apportionment), *quoting Burns v. Richardson*, 384 U.S. 73, 92 (1966). Those choices include whether to develop new districts from a clean slate, or to attempt to preserve existing constituencies as much as feasible; how communities of interest should be defined and grouped; how minority voting rights should be protected; and whether or not attempts should be made to preserve municipal

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[8] *Reynolds*, of course, like most of this Court's cases involving the relative size of election districts, involved a challenge under the Equal Protection Clause to districts from which state officials were elected. *Wesberry v. Sanders*, 376 U.S. 1 (1964), holds that challenges to the relative size of congressional districts are primarily governed by Article I, § 2's command that representatives be elected "by the People." However, the principle of deference to state legislative judgment applies in congressional districting cases as well:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that *a district court should similarly honor state policies in the context of congressional reapportionment.*

White v. Weiser, 412 U.S. 783, 795 (1973) (emphasis supplied).

boundaries. If seats in Congress have been lost, the legislature must decide how many incumbents should be forced to run against each other—and who these incumbents should be. Because of the intensely local and hotly political nature of such questions, this Court has held that a legislature should, if possible, be given time to enact a constitutional plan before a court ordered remedy is imposed. *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 676 (1964); *Reynolds v. Sims*, 377 U.S. at 587. And where a court ordered remedy is required, that remedy must honor state policies to the extent possible. *White v. Weiser*, 412 U.S. 783, 795-796 (1973).

A legislature's choices of policies to be followed in redistricting are so tied to local preferences—and at the same time so important to citizens of the State—that this Court has already indicated that those policies are more important than minuscule differences in deviation from absolute census population equality. In *White v. Weiser*, 412 U.S. 783 (1973), one question presented was whether the District Court erred in choosing "Plan C" over "Plan B" once it had concluded that the legislature's previously enacted plan was unconstitutional. Plan B adhered more closely to the legislature's lines; it also embodied a smaller deviation from equality than Plan C. 412 U.S. at 786-788. The Court held that Plan B should have been adopted:

> Here, it is clear that Plan B, to a greater extent than did Plan C, adhered to the desires of the state legislature while attempting to achieve population equality among districts. S.B. 1 [the unconstitutional plan] . . . established the State's 24 congressional districts with locations and configurations found appropriate by the duly elected members of the two houses of the Texas Legislature. As we have often noted, reapportionment is a complicated process. *Districting inevitably has a sharp political impact and inevitably political decisions must be made by those charged with the task.* . . .

> . . . Despite the existence of Plan B, the District Court ordered implementation of Plan C, which, as conceded by all parties, ignored legislative districting policy and *constructed districts solely on the basis of population considerations. The District Court erred in this choice.*

412 U.S. at 795-796 (citation omitted) (emphasis added).

Although the Court noted that Plan B also achieved greater census population equality than Plan C,[9] the whole thrust of the Court's discussion of the two plans is that Plan B was preferable not because of its smaller variance, but because it more closely adhered to the legislature's desires. If census population equality had been the only relevant factor, most of the discussion in *White* would have been entirely unnecessary.[10]

The principles of *White v. Weiser* were unanimously reaffirmed only last Term, in *Upham v. Seamon*, —— U.S. ——, 102 S. Ct. 1518 (1982):

> "[A] district court should . . . honor state policies in the context of congressional reapportionment. In fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'"

Id. at ——, 102 S. Ct. at 1521, *quoting White v. Weiser*, 412 U.S. at 795. The Court concluded that any court ordered remedy should follow as closely as possible the legislative plan, with changes limited to "those necessary to cure any constitutional or statutory defect." *Upham v. Seamon*, —— U.S. at ——, 102 S. Ct. at 1522.

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[9] "Indeed, Plan B achieved the goal of population equality to a greater extent than did Plan C." 412 U.S., at 796. The difference in deviations between the two plans was 0.125%. Computed from 412 U.S. at 786-787.

[10] *Accord, Doulin v. White*, 535 F. Supp. 450, 451 (E.D. Ark. 1982); cf. *In re Pennsylvania Reapportionment Cases*, 535 F. Supp. 191 (M.D. Pa. 1982).

To be sure, both *White* and *Upham* arose in the context of formulating a judicial remedy once it had been determined that a redistricting plan enacted by the legislature had been found unconstitutional. But the logic of their principles applies *a fortiori* to the initial question whether a legislatively enacted plan is constitutional, since this Court has repeatedly stated that legislatures have a wider latitude in the formulation of redistricting plans than courts. *E.g., Upham v. Seamon*, —— U.S. at ——, 102 S. Ct., at 1522; *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). Were *White* and *Upham* to be limited to remedies, a court might be placed in the incongruous position of ordering implementation of a plan that it would have had to condemn if enacted by the legislature. And if the constitutional standard were so strict as to leave no room for the interplay of legislative forces, then a legislature's plan could contain no state policies worth deference from the district courts. *White* and *Upham*, therefore, stand for the proposition that adherence to legislative political choices is preferable to obtaining a minute reduction in census population deviation. Where, as here, the differences among competing plans are less than the statistical imprecision of the census data, a legislature is not compelled to abdicate its role and automatically adopt whatever policies are embodied in the plan with the smallest census population deviation.

B. The District Court's standard in this case leaves no room for the exercise of legislative discretion.

The standard applied by the District Court in this case leaves no scope for a legislature to exercise any judgment, let alone to implement any state policies. The District Court found that the population deviation in P.L. 1982, c.1, was "not unavoidable" solely because the "legislature had the option of choosing from several plans with a lower total deviation." Opinion, 535 F. Supp. at 982, J.S. 8a. The District Court reached this conclusion despite the fact that the improvement achieved by the available alternatives was less than the statistical im-

precision of the census, and thus meaningless. See Section II(A), pp. 15-18 below. Moreover, it did so without considering whether the alternative plans adopted met the Legislature's legitimate objectives to the same extent as P.L. 1982, c.1. See Section III, pp. 27-34 below.

Consequently, the District Court's standard—that the legislature acts unconstitutionally unless it adopts that plan which has the smallest census population deviation—leaves no opportunity to implement state policies or exercise legislative judgment. Under the District Court's standard, a legislature will have but one plan to choose from,[11] the one with the smallest census population deviation, no matter how insignificant the differences among alternative plans, and without regard to other legitimate state policies that shaped the districts in the alternative plans. This, as we show in Sections II and III below, is not required by the Constitution or any decisions of this Court, and is contrary to this Court's admonition that legislative policies other than population equality are also important in drawing redistricting plans.

II. LEGISLATURES MAY CHOOSE AMONG REDISTRICTING PLANS WITH STATISTICALLY INSIGNIFICANT DEVIATIONS, AND ARE NOT, AS THE DISTRICT COURT ERRONEOUSLY HELD, REQUIRED TO ACCEPT WHATEVER PLAN HAS THE SMALLEST DEVIATION.

A. The 0.6984% deviation in this case is within the statistical imprecision of the census data, and therefore is the functional equivalent of zero.

If the 1980 Census were an entirely accurate enumeration of the population, it could be said with assurance

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[11] Indeed the District Court appears to have gone even further. It cited two plans which were not before the Legislature until after the passage of P.L. 1982, c.1. It thus indicated it might invalidate a reapportionment plan whenever there was before the *court* a plan with a smaller census population deviation, whether or not the plan had been before the legislature. See Section III(B), pp. 30-34 below.

that P.L. 1982, c.1, contains a maximum deviation from absolute equality of districts of 0.6984%—less than seven tenths of one per cent. In fact, however, because of the statistical imprecision in the census data this is surely not the true deviation from absolute equality. For it is universally recognized that the Census is not and cannot be made an entirely accurate measure of population. *See, e.g.*, National Academy of Sciences, National Research Council, *Counting the People in 1980: An Appraisal of Census Plans* 1 (1978) [hereafter cited as NAS Study].[12]

As this Court has recognized in the past, there is a small—but inevitable—statistical imprecision in any census. "These figures may be as accurate as such immense undertakings can be, but they are inherently less than absolutely accurate." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973). The imprecision is due primarily to undercounting the population—some people are simply missed by the census-takers.[13] The National Academy of Sciences notes that "it is virtually impossible to count every single inhabitant of the United States—at any cost." NAS Study at 1. Further, this undercount is not negligible. The NAS states that "far from being able to count the population to the last person, a statistical agency cannot count it to the last million persons." *Id.*

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[12] Although not reprinted in the Joint Appendix, this publication appears as Exhibit 2 to Dr. Trussell's statement, D. Ex. 5, and is part of the record in this case.

[13] Occasionally, although less often, a particular group may be overcounted. Overcounting can occur either (1) because some individuals are actually counted twice, or (2) because incorrect information was provided: if a 55-year-old man reports his age as 65, the 65 and over group will be overcounted (and the 55 to 64 group undercounted). The second type of overcounting will change the total population reported for a particular area only if the incorrect information relates to the area in which the individual resides.

at 93. The undercount error in the 1980 census is likely to be more than 2 million people nationwide, D. Ex. 5, App. 103, and may be as high as 5 million. J. Passel, J. Siegel & J. Robinson, *Coverage of the National Population in the 1980 Census, by Age, Sex, and Race: Preliminary Estimates by Demographic Analysis* 3-7 (1982) (Current Population Reports, Special Studies P-23, No. 115, 1982) [hereafter cited as "Passel *et al.*"].[14]

Although one can estimate—and theoretically compensate for—the undercount on a national level, such adjustments become much more difficult on a state or local level. The accuracy of estimates of the undercount decreases for smaller areas, and thus the adjustment that would be required becomes harder to determine. *See* D. Ex. 5, App. 99, 101, 103. Local adjustments are more difficult than national ones because the undercount varies for different segments of the population, and is not distributed equally among States or within different areas inside any State. *Id.*

For example, preliminary 1980 estimates suggest an undercount of about 1.5% for white men aged 35 to 54, but about 15% for black men of the same age. Passel *et al.* at 7. The undercount for any given area, such as a district within New Jersey, thus depends on the demographics of that particular area, *see* D. Ex. 5, App. 103; in this example, the relative percentage of white and black men in the district. But a specific area's undercount also depends on how uniformly the undercount for each demographic group is distributed nationwide. NAS Study at 98. Just because 15% of black men aged 35 to 54 were not counted by the Census nationwide does not mean that 15% of this group were missed in any par-

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[14] Although not reprinted in the Joint Appendix, a preliminary print of this report appears as Exhibit 6 to Dr. Trussell's statement in the record in this case. The report has since been published.

ticular district. Thus, the estimate of the undercount for a given locality is indeterminate because it depends not only on the degree, but also on the distribution of the nationwide undercount in that specific locality, D. Ex. 5, App. 103. It is this indeterminacy which is the inevitable statistical imprecision of the census. In short, for any given area, the precise number of persons is unknowable.

The net result is that accurate corrections for undercounting are impossible to make at the local level. Indeed, in *City of Newark v. Blumenthal*, 457 F. Supp. 30, 34 (D.D.C. 1978), Judge Gesell on an extensive record concluded just that. *See Gaffney v. Cummings*, 412 U.S. 735, 745-746 and n. 10 (1973). At the municipal level involved in this case, census population figures therefore contain an uncorrectable statistical imprecision, estimated by Dr. James Trussell of Princeton University to be about 1% Although presented with delusive precision, census figures are not precise and cannot be made so. Where, as here, the deviation from ideal district size is less than the known imprecision of the census figures, that variation is the functional equivalent of zero. It is unkown—and in practice unknowable—whether a small change in the apparent variation between districts will in fact increase or decrease the real degree of population equality between districts. As Dr. Trussell put the matter, without contradiction,

> [It is not] meaningful to rank one redistricting plan as superior to another when differences in district size are small. In my professional opinion, districts whose enumerated populations differ from one another by less than one percent should be considered to be equal in size. To push for numerical equality beyond this point is an exercise in illusion.

D. Ex. 5, App. 104.

B. A reapportionment plan that contains deviation less than the statistical imprecision of the census data satisfies the standards of Kirkpatrick v. Preisler and White v. Weiser.

The District Court in this case concluded that P.L. 1982, c.1, failed to meet constitutional standards set down in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *White v. Weiser*, 412 U.S. 783 (1973), simply because other plans, before the Legislature or the District Court, had smaller census population deviations. Opinion, 535 F. Supp. at 982, J.S. 8a. The District Court erred, for neither *Kirkpatrick*, *White*, nor any other decisions of this Court, require a legislature to adopt, automatically, the plan with the smallest apparent deviation among plans *all* of which have deviations less than the statistical imprecision of the census.

Article I, § 2 of the Constitution commands "that as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). This fundamental constitutional rule was interpreted in *Kirkpatrick* as "requir[ing] that the State make a good-faith effort to achieve precise mathematical equality." 394 U.S. at 530-531. In *Kirkpatrick*, the Court found that the legislature had not met the standard. The plan adopted had a deviation of 5.97%, and the "simple device of switching some counties from one district to another would have produced a plan with *markedly reduced* variations." *Id.* at 529 (emphasis supplied). The principle of unavoidability was further clarified in *White v. Weiser*. Striking down a plan embodying deviations of 4.13%, the Court explained that a congressional reapportionment plan cannot pass the constitutional test if "the districts [are] not as mathematically equal as *reasonably* possible." 412 U.S. at 790 (emphasis supplied).

There is no reason to read these cases, in commanding "a good-faith effort to achieve precise mathematical equality," *Kirkpatrick v. Preisler*, 394 U.S., at 530-531, as insisting the Legislature engage in an elusive quest for more precision than the data will permit. As we have shown in Part II(A) above, P.L. 1982, c.1, creates congressional districts that are *precisely equal to the degree of precision justified by the census data.* This is because there exists no way of knowing which of several plans with census population deviations less than the statistical imprecision of the census is, in fact, most equal. To recognize this fact in no way denigrates "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives," *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). Congressional redistricting is not and should not be an exercise designed merely to produce the illusion of precision. *Kirkpatrick* and *White*, commanding that congressional districts be "as mathematically equal as reasonably possible," *White*, 412 U.S. at 790, require no more precision than the mathematics of the census data will allow.

Nevertheless, Appellees Forsythe *et al.* argue that "reliance on the census for determination of congressional representation is mandated by the Constitution." Motion to Affirm at 13. Assuming that Appellees mean that census figures *must* be relied on for congressional districting within a given State, their argument is wrong under the language of the Constitution, the applicable Acts of Congress, and prior decisions of this Court. Appellees' proposed rule would add nothing of substance to the worth of a citizen's vote, nor would it ease the task of legislatures and courts in the redistricting process.

Article 1, section 2, clause 3 of the Constitution provides that

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . . The actual Enumeration shall be made within three Years after the first meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. . . .[15]

This language arguably requires that the census figures be used to apportion Representatives *among* the several States. But it speaks not at all to the apportionment of Representatives *within* a given State. As this Court held in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that question is governed by the constitutional language requiring that members of the House be elected "by the People." Article I, section 2, clause 1. And the constitutional language has been so understood by Congress. The Department of Commerce is required by statute to report total census figures by State, "as required for the apportionment of Representatives in Congress among the several States," within 9 months of the census date. 13 U.S.C. § 141(b). By contrast, use of census figures for redistricting within States is optional. 13 U.S.C. § 141(c).[16]

Moreover, in *Kirkpatrick v. Preisler*, this Court explicitly stated that census data need not be relied on if, for example, there had been shifts in population within the State since the census was taken. 394 U.S. at 535. Indeed, reliance on census data in *Kirkpatrick* seems to

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[15] The first sentence of this clause no longer governs apportionment of Representatives among the several States, which is now controlled by Section 2 of the Fourteenth Amendment.

[16] Under 13 U.S.C. § 141(c), States that desire to have census data reported on the basis of local boundaries, *e.g.*, voting precincts, are allowed to submit plans identifying particular geographic areas for which specific tabulation is requested. Plans submitted by the states are reviewed by the Secretary of Commerce. Tabulations under plans submitted by a State and approved by him must be completed and reported to the State involved with particular dispatch.

have been due entirely to the fact that the Court in that case found that census data was the most reliable data available at the time. *See* 394 U.S. at 529, 532. *Kirkpatrick*, in other words, commands that census data be used for what it is worth: no more and no less.[17] That is precisely the point we urge in this case.

Finally, cogent reasons of policy argue against any rule that States be required, no matter what the reality, to rely solely upon census figures in congressional redistricting. Any such rule would command malapportionment whenever census data were inaccurate. This would be a cruel mockery of the principle of equality commanded by *Wesberry v. Sanders* and its progeny. Moreover, such a rule would produce no benefits in the form of increased certainty or simplicity in the redistricting process. Census figures are not fixed. The New Jersey figures, for example, have changed twice since they were initially released. See note 1, above. Appellees' proposed rule would require redistricting whenever the Department of Commrce revised the census figures.

C. The District Court's standard imperils most of the redistricting plans adopted by state legislatures under the 1980 Census.

The District Court held that (absent special justification) a legislature must draw congressional districts so that they are as close as mathematically possible to absolute census population equality. If that stringent standard were followed across the country, most and possibly all of the redistricting plans adopted by state legislatures would fall unless the legislature could show special justification for every deviation.

As far as we have been able to determine, 31 state legislatures to date have completed congressional redis-

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[17] Where there are known inaccuracies in the census data, this Court has permitted corrective measures to be taken. *Mahan v. Howell*, 410 U.S. 315, 330-333 (1973) (state legislative reapportionment). *See also Burns v. Richardson*, 384 U.S. 73, 91-92 (1966) (Equal Protection Clause does not require use of census figures).

tricting plans based on the 1980 census.[18] Eleven of these States have adopted plans with a higher deviation than that presented here,[19] and four others have deviations

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[18] Six states—Alaska, Delaware, North Dakota, South Dakota, Vermont and Wyoming—have but a single congressman and therefore no need to redistrict. Two states—Maine and Montana—will not redistrict until 1983. M. Stephens, *Common Cause Report on Congressional and State Redistricting* 9 (No. 2, June 1982) [hereafter cited as "Common Sause Report"]. Seven States are under court-ordered redistricting plans after the legislature failed to enact any plan: Colorado, *Carstens v. Lamm*, No. 81-F-1713 (D. Colo. Jan. 26, 1982); Illinois, *Ryan v. Otto*, 50 U.S.L.W. 3546 (Jan. 11, 1982) (mem.); Kansas, *O'Sullivan v. Brier*, 540 F. Supp. 1200 (D. Kan. 1982); Michigan, Common Cause Report 16; Minnesota, *Orwoll v. LaComb*, 50 U.S.L.W. 3915 (May 17, 1982) (mem.); *Schatzle v. Kirkpatrick*, 50 U.S.L.W. 3915 (May 17, 1982) (mem.); and South Carolina, *South Carolina State Conference v. Riley*, 533 F. Supp. 1178 (D.S.C. 1982). The California legislature adopted a plan, but it failed a referendum on June 8, 1982, and thus will be in effect only for the 1982 elections. *Assembly v. Dukmejian*, 30 Cal. 3d 638, *appeal dismissed and cert. denied sub nom. Republican National Committee v. Burton*, 50 U.S.L.W. 3857 (April 26, 1982).

Redistricting Georgia and Mississippi is presently in litigation after objections by the Department of Justice. *Jordan v. Winters*, 541 F. Supp. 1135 (N.D. Miss. 1982), *appeal pending sub nom. Brooks v. Winters*, No. 82-233; Common Cause Report 13. The Hawaii plan has been declared unconstitutional and will be redrawn. *Id.*

[19] Indiana (2.96%); Alabama (2.45%); Tennessee (2.40%); Virginia (1.81%); North Carolina (1.76%); New York (1.64%); Kentucky (1.39%); Washington (1.30%); Massachusetts (1.09%); New Mexico (0.87%); and Arkansas (0.78%). The Arkansas figure is for a court-ordered plan; the original plan adopted by the Legislature had a deviation of 2.10%. *Doulin v. White*, 535 F. Supp. 450, 453 (E.D. Ark. 1982).

Figures for deviations of state redistricting plans are from Council of State Governments & National Conference of State Legislatures, *Reapportionment Information Update* 7 (May 10, 1982), as supplemented by issues of June 4, 1982, and July 23, 1982, unless otherwise specifically noted.

So far as we are aware, only the Arkansas statute is presently under challenge for violating the principle of congressional district equality.

quite similar to New Jersey's.[20] All of these plans would be jeopardized by the District Court's standard, since with leisure for reflection it is virtually certain that *some* reduction of census population deviations could be made to almost any plan.[21] Legislatures would have to ignore municipal boundaries completely, and work with the smallest census units available.[22] Realistically, of course, not every state redistricting plan will be challenged in court. But the District Court's standard, if applied nationwide, would make every state legislature's redistricting plan vulnerable to after-the-fact attack by anyone with a complaint and a calculator.

Significantly, the redistricting plan approved after this Court's decision in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), contained a deviation of 0.629%—virtually the

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[20] Ohio (0.68%); Nevada (0.60%); Oklahoma (0.58%); West Virginia (0.50%). The remaining sixteen states have plans with census population deviations ranging from 0.45% (Connecticut) to 0.02% (Rhode Island).

[21] The state with the smallest deviation among legislatively adopted plans is Rhode Island, whose two districts have a deviation of 0.02%, or about 95 people. The average census block—the smallest unit of census population measurement—has a population of about 70. See note 38 below. If, as seems likely, there is any census block with a census population of 94 or fewer on the boundary between the two districts and in the larger district, moving it to the smaller district would slightly reduce the deviation between the two. Of course, as deviations become larger the possibility of such changes is even greater.

[22] Working with the smallest census units available will, of course, result in the greatest fragmentation of existing political boundaries and thus legislatures typically work in larger blocks. The Congress has, in fact, recognized this and 13 U.S.C. § 141(c), which provides for state input into the geographic divisions which will be used in reporting population figures, contemplates that often States may desire to work with census units larger than the smallest possible ones. In the present case, *all* of the plans before the Legislature and the District Court respected municipal boundaries. Thus, in practice municipalities were the smallest units out of which the plans were built.

same deviation declared unconstitutional by the District Court in this case. *Preisler v. Secretary of State*, 341 F. Supp. 1158, 1162 (W.D. Mo.), *aff'd sub nom. Danforth v. Preisler*, 407 U.S. 901 (1972). Similarly, district courts have upheld plans with larger deviations. E.g., *West Virginia Civil Liberties Union v. Rockefeller*, 336 F. Supp. 394 (S.D.W.Va. 1972) (0.78% average deviation; competing plan would have reduced). In *Doulin v. White*, 535 F. Supp. 450, 451 (E.D.Ark. 1982), the court ordered implementation of a plan with a deviation of 0.78% despite the availability of an alternative (less like the legislature's plan) with a deviation of 0.13%.

D. The District Court's standard substitutes the policies of computer programmers for those of the Legislature.

A consistent theme of this Court's cases dealing with legislative reapportionment has been that, when all is said and done, reapportionment is primarily a matter for legislative judgment, *Upham v. Seamon*, —— U.S. ——, ——, 102 S. Ct. 1518, 1521 (1982); *White v. Weiser*, 412 U.S. 783, 795 (1973); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). "[A] State legislature is the institution that is by far the best suited to identify and then reconcile traditional state policies within the constitutionally mandated framework . . . ." *Connor v. Finch*, 431 U.S. 407, 414-415 (1977).

All redistricting plans enacted by state legislatures possess the virtue of having been promulgated by the elected representatives of the people through the democratic process. Legislatures have a higher function in the redistricting process than to see which computer-generated redistricting plan has the smallest deviation from absolute census population equality. Were this not so, the legislature would become nothing more than an arithmetic assistant to the computer programmers.

In the present case, for example, one of the plans relied on by the District Court to strike down P.L. 1982, c.1, was that devised by Dr. Reock and mailed to every member of the New Jersey Legislature. Opinion, 535 F. Supp at 981, 982, J.S. at 5a, 8a. That plan, of course, embodied considerations other than census population equality alone. Dr. Reock—and not the Legislature—decided what those other considerations should be, and how competing policies should be reconciled. P. Ex. 1, App. 14-22. He, and not the Legislature, decided that compactness of districts was important, and decided precisely *how* important compactness would be. *Id.* at 18. Dr. Reock, and not the Legislature, decided that New Jersey's reapportionment plan should protect incumbent Congressmen to the greatest extent possible by reducing the number of conflicts between incumbents to the absolute minimum—and decided which Congressmen should not be protected. *Id.* at 14-16. And so forth.[23]

To hold that the Legislature's plan should be struck down because the Reock (or any other) plan produces a statistically insignificant "improvement" in census population equality[24] is to hold that the legislatures of the several States—the institutions "by far the best situated to identify and then reconcile traditional state policy," *Connor v. Finch*, 431 U.S. 407, 414-415 (1977)—are constitutionally compelled to adopt the policy choices of that person whose computer program produces the smallest deviation from absolute census population equality. This would make control of fundamental ques-

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[23] In addition to the considerations of which Dr. Reock was aware, it is possible that the method he used to produce his plan, perhaps unknown to him, foreclosed some policy choices or embodied others. This certainly may be so for computer-generated plans in the future. Complex computer programs are not always entirely within the conscious control of their authors and sometimes produce unintended results—as those who have had to deal with computerized billing systems are well aware.

[24] As we have shown above, see pp. 15-18, the "improvement may be wholly illusory.

tions of state policy the prize in a contest among programmers. Where, as in this case, the deviation is within the statistical impression of the census data, to strike the legislature's plan is to substitute other policy choices for those of the legislature.

III. THE DISTRICT COURT INCORRECTLY HELD THAT THE INSIGNIFICANT DEVIATIONS IN P.L. 1982, c.1, WERE AVOIDABLE.

The record establishes without contradiction that the Legislature, in drafting and passing its reapportionment plan, sought to minimize the population deviations. Assembly Speaker Karcher wanted to minimize the population deviations among districts. Opinion, 535 F. Supp. at 981, J.S. 6a. The sponsor of P.L. 1982, c.1, Senator Feldman, indicated that he wanted deviations as close to zero as possible. *Id.* The deviation in the plan which was ultimately passed was below one percent, well within the statistical imprecision of the Census, and certainly within the range of deviations approved in other contexts by this Court and other district courts. See Section II(C), above. Nevertheless, the District Court found that these small deviations were avoidable solely because the "legislature had the option of choosing from several other plans with a lower total deviation." *Id.* at 982, J.S. 8a.

The court reached this conclusion on the basis of two plans which were before the Legislature, the Hardwick Plan (A-3817) and the DiFrancesco Plan (S-3547),[25] and

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[25] Dr. Reock's plan, also referred to by the District Court, was sent in its original form to all members of the Legislature by Dr. Reock, but was never introduced as he proposed it. The Hardwick Plan (A-3817) was a modified version of the Reock plan. P. Ex. 1, App. 5. As we have pointed out, the District Court's references to Dr. Reock's plan are somewhat misleading, since the District Court used the wrong figures in referring to its deviation. And the "amended" form of Dr. Reock's plan, also referred to by the District Court, was prepared after this litigation was commenced and apparently has never been presented to the Legislature. See note 5 above.

two plans which were introduced after the passage of P.L. 1982, c.1: the Bennett II Plan (A-614) and the Kavanaugh II Plan (A-615). Opinion, 535 F. Supp. at 982, J.S. 8a. In addition to the plans mentioned by the District Court, there were two other plans before the Legislature with smaller census population deviations than P.L. 1982, c.1. These were the Kavanaugh I plan (A-3776), and S-3328/A-3646.[26] J. Ex. 7, App. 151, 154, 160. However, none of these plans demonstrates that the deviation in P.L. 1982, c.1, was avoidable because each one contains serious flaws. The Legislature was not required to adopt them.

A. The alternative plans before the Legislature, including those relied upon by the District Court, were flawed.

The four plans with lower census populations deviations which were before the New Jersey legislature when it adopted P.L. 1982, c.1, including the two cited by the District Court, would have diluted minority voting strength, either in the Tenth District (Newark), which is the only black majority district, or in the Fourth District (Trenton), which is the district with the second highest concentration of black voters.

Under the congressional apportionment based on the 1970 census, the district which included the City of Newark was about 60% black in 1980. Bureau of the Census, *1980 Census of Population & Housing (New Jersey)* 15 (Advance Reports, March 1981). Due to a decline in

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[26] Three other plans before the legislature and relied upon by plaintiffs contained defects which clearly disqualified them. S-3549/A-3734 left out Hunterdon County altogether. J. Ex. 7, App. 159. S-3538/A-3767 included three municipalities twice. *Id.* at 161. A-3772 left out Monroe Township in Gloucester County, and placed the municipality of Magnolia in a district with which it was not contiguous. *Id.* at 165; J. Ex. 6, App. 146. Other plans had higher population deviations than P.L. 1982, c.1. J. Ex. 4, App. 123-133.

the black population of Newark between 1970 and 1980,[27] and the increase in the ideal district population, some decline in the black voting strength of this district was inevitable. Thus, under P.L. 1982, c.1, this district, the Tenth District, is 54.8% black. J. Ex. 7, App. 168. However, three of the plans with smaller population deviations would have reduced the black voting strength in the Newark district even further. Two of them, the Kavanaugh I Plan (A-3776) and S-3328/A-3646, reduced black voters to a minority in the district—46.3% and 38.7%, respectively.[28] J. Ex. 7, App. 171, 169. The third plan, the DiFrancesco Plan (S-3547)[29] retained a black majority in the district, but just barely: 52.8%. *Id.*, App 172. This would have further decreased the likelihood of black control of the district.

The Hardwick Plan (A-3817),[30] while not reducing minority votes in the Newark district, diluted the minority vote in the next largest black district, the Trenton district. Under the Hardwick plan, the Trenton district is 11.9% black, while under P.L. 1982, c.1, it is 17.3% black. D. Ex. 4, App. 94. In addition, those municipalities in Burlington County which are excluded from the Trenton district of A-3817 have rapidly increasing black populations. *Id.*, App. 94-95. Black political leaders thought those differences were important. *Id.* Thus, under P.L. 1982, c.1, black voting strength in the Trenton

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[27] In 1970, the population of Newark was reported as 382,417, people, 207,458 black. 1 Bureau of the Census, *1970 Census of Population, Part 32 (New Jersey)*, § 1, at 71 (Table 23) (March 1973). In 1980 there were 191,743 black people in Newark, out of 329,248 people. Bureau of the Census, *1980 Census of Population & Housing (New Jersey)* 6 (Advance Report, March 1981).

[28] These plans were not cited by the District Court.

[29] This plan was cited by the District Court. Opinion, 535 F. Supp., at 982, J.S. 8a.

[30] This plan was cited by the District Court, Opinion, 535 F. Supp. at 982, J.S. 8a.

district can be expected to increase over the next 10 years, while under A-3817 it would have been likely not to increase, or to increase more slowly.[31]

The existence of these plans therefore does not show that the population deviations were avoidable. P.L. 1982, c.1, protects the minority vote from dilution better than any of these plans.[32] In view of their dilution of minority voting strength, they were not viable alternatives to P.L. 1982, c.1. Thus, they do not provide support for the District Court's conclusion that the census population deviation in P.L. 1982, c.1, was avoidable.

B. The alternative plans not before the Legislature, relied upon by the District Court, were also flawed. In any event, they should not have been considered by the District Court.

In concluding that the New Jersey Legislature had not made a "good-faith effort to achieve precise mathematical equality," *Kirkpatrick v. Preisler*, 394 U.S. at 530-531, the District Court relied upon two bills—the Bennett II plan (A-614) and the Kavanaugh II plan (A-615)—which were not before the Legislature when P.L. 1982, c.1, was enacted.[33] It also relied on the

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[31] The Reock plan, also cited by the District Court, was never introduced as proposed by Dr. Reock. However, the Hardwick plan (A-3817) is a modified version of that plan. Like the Hardwick plan, the Reock plan excludes from the Trenton district (District 13 in Dr. Reock's nomenclature) 14 municipalities from Burlington County which are included in the Trenton district (District 4) in P.L. 1982, c.1. *Compare* P. Ex. 1, App. 23-34, *with* P.L. 1982, c.1, J.S. 16a.

[32] D. Ex. 2, App. 86-89; D. Ex. 3, App. 91-92; D. Ex. 4, App. 93-96.

[33] Appellees Forsythe *et al.* suggest that these bills were before the legislature when P.L. 1982, c.1, became law. Motion to Affirm at 10 n.3. It is true that they were proposed for introduction on January 18, 1982 [illegible] day before the Governor signed P.L. 1982, c.1. However, the bill passed the Assembly on January 18. Moreover, A-614 and A-615 were not introduced, that is, given their first

amended version of Dr. Reock's plan, which was not prepared until after this litigation was commenced.

These plans not before the Legislature but relied on by the District Court contained flaws of their own. The amended version of Dr. Reock's plan, in addition to containing Dr. Reock's own views on such matters as continuity, "political fairness," compactness, and so forth,[34] was still substantially the same as the Hardwick plan, and contained the same flaws. *See* pp. 29-30 above. The Bennett II plan (A-614) and the Kavanaugh II plan (A-615) both had somewhat smaller proportions of black voters in the Newark District than P.L. 1982, c.1, and substituted predominantly white suburbs for South Orange and Hillside. J. Ex. 7, App. 166, 168, 170. Had they been available for consideration, they would have been rejected because of the same opposition by the State's black political leadership. *See* D. Ex. 2, App. 86-89. These bills, although never considered, contained flaws very nearly identical with other bills quite properly rejected. Even if the District Court was justified in considering them, they give no support to its conclusions.

Moreover, the District Court should not have considered plans not before the Legislature in making its judgment. To begin with, it is hard to see how the good faith of the legislative effort can be impugned on the basis of plans that were not available for legislative consideration. A legislature that makes a good-faith effort to achieve population equality, and in fact comes very close to that goal, should not be blindsided by alternatives that it had no chance to consider.

This is the rule with regard to review of decisions of trial courts, and the reasons for the rule are equally ap-

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reading, until February 1, 1982. J. Ex. 4, App. 123. It is clear they could not have been considered by legislators deciding how to vote on P.L. 1981, c.1.

[34] See p. 26 above.

plicable to judicial review of the good faith of legislatures making redistricting decisions. "It is the most fundamental rule of appellate procedure that a party may not sit idly by and allow the trial court to commit error, wait for a verdict, and complain of error only if the verdict is unfavorable." *Skogen v. Dow Chemical Co.*, 375 F.2d 692, 703 (8th Cir. 1967); *see United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977); *United States v. Ortiz*, 422 U.S. 891, 898 (1975). The purposes of the rule are "(1) to [apprise] the court of the litigant's position so that the court in the furtherance of justice might correct its ruling where shown to be in error; and (2) to permit an opponent to obviate the defect where possible." 5A J. Moore, W. Taggert & J. Wicker, *Moore's Federal Practice* ¶ 46.02, at p. 1903 (1976 ed.) (footnotes omitted). Just as proper respect for the judicial process requires litigants to give courts a fair opportunity to consider the litigants' arguments before raising them on appeal, proper respect for the legislative process requires political opponents of a redistricting plan to give the legislature a fair opportunity to consider their alternatives before seeking to overturn the legislature's plan in court. Otherwise, political opponents with little hope of legislative success would be encouraged to bypass the political process entirely. By withholding their plan they assure that the legislature cannot make use of any good features it may contain. Thereafter they seek its adoption by a federal court on the basis that the legislature's plan lacks those features. In such a situation, it is hardly the legislature that has not made a "good-faith effort," *Kirkpatrick v. Preisler*, 394 U.S. at 530-531.

Of course, a court considering whether a particular deviation from absolute equality is avoidable may consider a variety of factors. It is not limited to the mechanical task of seeing whether other plans were introduced with smaller deviations. If the deviation is large, its avoidability may be self-evident. *Wesberry v. Sanders*,

376 U.S. 1, 7 (1964) (some districts more than twice the size of others). If the deviation is smaller, it may be possible to see from maps and census data that it could easily have been avoided. *Kirkpatrick v. Preisler*, 394 U.S. at 531-532 (legislature used inaccurate data; record showed that "simple device" of switching a few counties would have markedly reduced the deviations). In some cases avoidability may not even be seriously disputed. *E.g.*, *White v. Weiser*, 412 U.S. at 790 & 790 n.9 ("State does not really dispute" avoidability; House passed two bills with smaller deviations). But a court should not conclude that a legislative plan created a greater deviations than necessary merely because someone has devised a plan, not before the legislature, with smaller deviations. Congressional districts must be "as mathematically equal as reasonably possible," *White v. Weiser*, 412 U.S. at 790, but it is not "reasonably possible" for a legislature to adjust its plan in light of another plan it has never seen.[35]

Redistricting "is primarily a matter for legislative consideration and determination." *Reynolds v. Sims*, 377 U.S. 533, 586 (1964). To allow consideration—and possibly even adoption—of alternative plans not before the legislature makes federal district courts into the primary forum for political debate and decision. This they are not. Their role, however crucial, is limited to review of legislative action in light of constitutional standards. In

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[35] In *White v. Weiser*, this Court did rely in part upon plans—"Plan B" and "Plan C"—not before the Texas Legislature in concluding that the deviations in the Legislature's plan were avoidable. 412 U.S. at 790-791. But the propriety of such consideration was not briefed, not argued, and not discussed in that case. Indeed, as the Court pointed out, "the State does not really dispute" the proposition that the deviations were avoidable, *id.* at 790. Its arguments were only that, although avoidable, they were justified by other considerations, *id.* at 791-792, and that *Kirkpatrick* should be "modified," *id.* at 792-793. *White* therefore is of little relevance in determining whether plans not before the legislature may properly be considered.

this case, since the District Court relied upon plans not before the legislature in concluding that the deviations were avoidable, and since the plans which were before the legislature were flawed, the District Court erred.

IV. EVEN IF THE DEVIATIONS IN P.L. 1982, c.1, WERE AVOIDABLE, THEY ARE JUSTIFIED BY THE LEGISLATIVE POLICY OF PRESERVING MINORITY VOTING STRENGTH.

Preservation of minority voting strength is a constitutionally permissable objective in reapportionment. *United Jewish Organizations v. Carey*, 430 U.S. 144, 161-162 (1977) (White, Stevens, Brennan and Blackmun, JJ.), 430 U.S. at 180 (Stewart and Powell, JJ., concurring).[36] The importance of preventing dilution of minority voting strength is great, and justifies small deviations from population equality. Thus, other district courts have consciously sought to protect the interests of minorities when drawing redistricting plans. *See In re Illinois Congressional District Reapportionment Cases*, No. 81 C3915 (N.D. Ill. 1981), *aff'd sub nom. Ryan v. Otto*, 50 U.S. L.W. 3546 (Jan. 11, 1982); *Carstens v. Lamm*, No. 81-F-1713 (D. Colo., Jan. 26, 1982).

The record establishes that avoiding the dilution of minority voting strength was an important consideration in the adoption of P.L. 1982, c. 1.[37] As shown in Section III above, each of the alternative plans with lower devia-

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[36] *United Jewish Organizations* involved apportionment of a state legislature. However, the conclusion that race may be considered in reapportionment plans applies to congressional reapportionment as well. Indeed, as the plurality points out, the practical necessity of complying with Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c), requires that race be taken into account. Section 5 applies as well to congressional reapportionment.

[37] Karcher Deposition 125-26, 133-137, Jackman Deposition 96-99, 131-34; Feldman Deposition 12, 40-42.

tions fails to protect minority voting strength as well as it did. Even if the dilution of minority votes in the alternative plans is not so severe as to disqualify those plans as viable alternatives, still the legislature was within its constitutional prerogative in selecting the plan which best protects minorities over alternatives with slightly lower census population deviations.

The District Court did not reject the uncontradicted testimony of legislative leaders that one of the Legislature's major goals was the preservation of minority voting strength. Nor did that court find that any of the other plans would have protected minority voting strength better than P.L. 1982, c.1. It held, however, that every deviation from absolute census population equality must be shown to be lineally related to preserving minority voting strength. And it concluded that no sufficient connection had been shown on this record. As we shall demonstrate, in doing so the District Court misunderstood the legislative process, the manner in which redistricting must be carried out, and this Court's previous decisions.

Legislatures are intended to accommodate conflicting interests, not single-mindedly pursue *any* one goal, however meritorious. Little if any major legislation can be enacted without engaging in compromise. Indeed this is the genius of the democratic process, and the means by which competing groups can work out a legislative solution that is tolerable, if not ideal, for all of them. Protection of minority voting strength was, according to all concerned, a major goal for redistricting legislation. But it was not the only goal for every legislator. Much hard work, and no doubt some compromise, was necessary on the part of those most concerned with minority voting strength. *See, e.g.*, D. Ex. 2, App. 86-90. But P.L. 1982, c.1, preserves minority voting strength better than *any* of the alternatives. See pp. 28-31 above. With the trivial deviations involved in this case, that should be sufficient justification for its enactment.

A legislature engaged in redistricting is limited in flexibility by the size of the census units or building blocks from which it was assembling the congressional districts. The smallest available census unit must be placed as a whole in one or another legislative district.[38] It cannot be subdivided and split between two or more districts because no information is available to determine how many people should be allocated to each subdivision. Moreover, unless isolated "islands" are to be created, census units can be switched only between adjacent districts and only if both the units to be switched are on the boundary between the two districts. If population is to be shifted between two nonadjacent districts, it can be done only by a series of shifts involving additional districts. In this way a single change can ripple across the State like the fall of complicated rows of dominoes. Finally, if it is necessary or desirable to take factors other than population into account—for instance, to preserve minority voting strength in one or more of the districts around the State—the complications increase. In such cases racial composition of the districts to be shifted would have to be taken into account, further limiting the choice of census units to be moved. In some cases it may be impossible to make exactly the change desired.

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[38] In theory, the smallest available unit is the census block. Census blocks have an average population of about 70, although in densely populated residential districts they may be much larger. However, population information by census block is not even now available for all of New Jersey. Bureau of the Census, *1980 Census Users' Guide* 56 (1982). In fact, P.L. 1982, c.1, and all the other plans that were before the Legislature and the District Court preserved municipal boundary lines. Thus, in effect, municipalities were the smallest units from which the districts were built. There are 567 municipalities in New Jersey, *Fitzgerald's Manual of the Legislature of New Jersey*, 960 (1982), of which 406 are listed in Exhibit A to Dr. Reock's affidavit, P. Ex. 1, App. 23-24. These 406 range in census population from 9 (Tavistock Borough in Camden County) to 329,248 (Newark in Essex County). Only 20 of those municipalities had census populations under 1,000. *Id.*

Any court reviewing a plan after it has been enacted may find it difficult or impossible—and certainly will find it taxing—to reconstruct precisely how policy decisions concerning some districts (such as the decision in this case to preserve minority voting strength in the Newark district) affected the precise population of other districts. But because direct causation cannot be reconstructed does not mean that there was in fact no causal connection when the legislature acted. To retrospectively require the legislature to show precisely how preservation of minority voting strength in one district caused the population variances in other districts imposes an impossible burden on the legislature. When the deviations involved are as small as those in P.L. 1982, c.1, it should be sufficient that the plan selected better protects minorities than the available alternatives.

In holding that the legislative goal of preserving minority voting strength must be directly, causally related to every deviation from absolute census population equality, the District court effectively concluded that no other goals could every justify such a deviation. This, of course, is not the law. This Court has consistently indicated that a variety of goals may justify deviations. *E.g.*, *White v. Weiser*, 412 U.S. 783, 790-791 (1973). And of course, to say that the Legislature may have had other goals in mind in addition to preventing the dilution of minority voting power does not mean that courts should not review the plan with the protection of minority voting power in mind. See *Katzenbach v. Morgan*, 384 U.S. 641, 656-658 (1966) (statute to protect minority voting rights upheld although it did not take every conceivable step towards that end). Even if the deviations in P.L. 1982, c. 1, require special justification, the goal of preventing dilution of minority voting rights provides that justification here.[39]

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[39] The second reason the District Court rejected the appellants' argument respecting dilution of minority voting rights was that P.L. 1982, c.1, failed to include Orange, "a city with a high

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the case remanded with directions to enter judgment for appellants.

Respectfully submitted,

KENNETH J. GUIDO, JR.*
HARRY R. SACHSE
KEVIN A. GRIFFIN
LOFTUS E. BECKER, JR.
DONALD J. SIMON
SONOSKY, CHAMBERS, SACHSE & GUIDO
1050 31th Street, N.W.
Washington, D.C. 20007
(202) 342-9131

LEON J. SOKOL
MICHAEL D. SOLOMON
GREENSTONE AND SOKOL
39 Hudson Street
Hackensack, New Jersey 07601
Attorneys for Appellant
Carmen A. Orechio, President, New Jersey Senate

CLIVE S. CUMMIS
CHARLES J. WALSH
JERALD D. BARANOFF
SILLS, BECK, CUMMIS, ZUCKERMAN, RADIN & TISCHMAN, P.A.
33 Washington Street
Newark, New Jersey 07102
Attorneys for Appellants
James F. Florio, *et al.*

LAWRENCE T. MARINARI
ROBERT A. FARKAS
MARINARI & FARKAS, P.C.
1901 N. Olden Avenue Ext.
Trenton, N.J. 08618
Attorneys for Appellant
Alan J. Karcher, Speaker, New Jersey Assembly

* Counsel of Record

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concentration of minority groups" within the Tenth Congressional District. Opinion, 535 F. Supp. at 982-983, J.S. 9a. It is difficult to see how the District Court justifies second-guessing the legislature in this area. Orange itself, though its minority population was not significantly dissimilar in 1970, had been a part of the Eleventh Congressional District in the 1970 reapportionment. To infer from the Legislature's failure to move it into the Tenth District (a move that would have necessitated the removal of a like number of other people, many black) that the Legislature did not make a good-faith effort to protect minorities, was completely unjustified.